



impairment is based on an average of the ratings of Drs. Peter Bieri and Daniel Zimmerman. The ALJ also found claimant sustained a 74.75% work disability. The ALJ's work disability finding was comprised of a 100% wage loss and a 49.5% task loss. The ALJ's determination of task loss was based on an average of the task loss opinions of Drs. Bieri and Zimmerman.

The Fund contends that the ALJ erred in his findings regarding the nature and extent of claimant's disability. Specifically, the Fund argues claimant did not experience a 100% wage loss and that the ALJ committed error in discounting or disregarding the opinions of Dr. Chris Fevurly regarding functional impairment and task loss. The Fund maintains the ALJ violated K.S.A. 44-515(e) in failing to consider Dr. Fevurly's opinions.

Claimant requests the Board affirm the Award.

The issues before the Board on this appeal are:

- 1) Did the ALJ err in determining claimant's functional impairment and work disability?
- 2) Did the ALJ err in discounting or failing to consider the opinions of Dr. Fevurly in determining claimant's task loss and permanent functional impairment?

#### **FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant was age 45 when he testified at the October 10, 2011 regular hearing. He commenced employment for respondent as an over-the-road truck driver in April 2009, although he had previously worked for respondent. On July 2, 2009, in or near Jasper, Arkansas, the brakes failed on the trailer claimant was hauling, causing the truck to leave the roadway, resulting in a "roll over" accident. Claimant experienced pain in his neck, back, left elbow, and left shoulder.

Claimant was life-flighted to a hospital in Arkansas and, upon his return to Kansas, he commenced authorized treatment. Claimant received conservative treatment from a number of medical providers. Claimant also underwent two surgical procedures:

- 1) On April 1, 2010, orthopedic specialist Dr. Steve Munns performed a diagnostic arthroscopy of claimant's left shoulder, which revealed posterior instability and a SLAP tear. Dr. Munns repaired the SLAP lesion.

2) On July 19, 2010, Dr. Lynn Ketchum, also an upper extremity surgeon, performed a release of the left pronator and denervation of the left lateral epicondyle.

After his accident, claimant returned to work for respondent performing mowing, office tasks, and on two occasions driving a truck short distances. Claimant's return to work for respondent occurred in early August 2009 and continued through approximately mid-September 2009, a period of about six weeks. Claimant estimated he earned approximately \$230 a week. The owner of respondent, R.H. Stover, went out of business and claimant is unaware of his whereabouts. Claimant heard Mr. Stover filed for bankruptcy.

Commencing in August or September 2011 and continuing into October 2011, claimant was employed as a truck driver by G&B Express. Claimant drove for G&B for approximately five weeks and earned a total of about \$2,000, however, the record is not clear as to the amount of earnings he actually received.

Claimant's spouse, Mary Johnson, testified by deposition. She is also a truck driver and at some point she formed her own company, SMJ Trucking.<sup>2</sup> In approximately July 2011, Mary Johnson began driving for R&M Transportation. R&M paid Mary Johnson 80% of what the load paid. However, Ms. Johnson did not receive the entire 80% because apparently 6 cents per mile was paid by R&M to McMullen Trucking, from whom Mary Johnson was purchasing her truck.

At some point after Mary Johnson began driving for R&M claimant started accompanying her in the cab of the truck on her journeys delivering for R&M. At first, claimant did not drive and would just keep his wife company and assist her with maps, routes, and similar activities. However, in late November, 2011, claimant began to assist Mary Johnson in the driving. Mr. Johnson and Ms. Johnson split the driving duties with Ms. Johnson driving 10 hours in the daytime and claimant driving 10 hours at night.

Claimant filled out no employment paperwork for R&M and does not consider himself an employee of R&M. Claimant considers himself an employee of SMJ Trucking, his wife's company. Claimant did fill out employment papers for SMJ. However, claimant has received no pay, wages, or any other form of compensation from R&M Transportation, his wife, or SMJ Trucking. All payments from R&M go to Mary Johnson. Claimant has received no income since his accidental injury, other than the wages he received from respondent and G&B Express.

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<sup>2</sup> "SMJ" stands for Steven and Mary Johnson. The record is unclear whether SMJ Trucking is incorporated.

Dr. Chris Fevurly, who is board certified in internal medicine, occupational medicine, and as an independent medical examiner, met with claimant at the request of counsel for the Fund on March 1, 2011. Dr. Fevurly reviewed medical records, took a history and performed a physical examination. Dr. Fevurly found a 10% permanent impairment of function only to claimant's left shoulder. Dr. Fevurly reviewed Mr. Santner's task list and found claimant sustained no task loss as a consequence of the July 2, 2009 accidental injury.

Dr. Daniel Zimmerman, an internist and board certified independent medical examiner, saw claimant at the request of his attorney on March 30, 2011. He reviewed medical records, took a history and conducted a physical examination. Dr. Zimmerman rated claimant's permanent impairment of function at 9% to the whole body for the cervical spine, 8% to the body for the thoracic spine, 15% to the left shoulder, and 10% to the left arm. He combined those ratings to 29% permanent partial loss of physical function to the whole body. Dr. Zimmerman reviewed Mr. Santner's task list and found claimant could no longer perform 7 of the 12 tasks, for a 58% task loss.

Dr. Peter Bieri, a physician and a fellow of the American Academy of Disability Evaluating Physicians, examined claimant at the request of the ALJ on October 18, 2011. Dr. Bieri reviewed medical records, took a history and performed a physical examination. He reported his findings and opinions to the ALJ. Dr. Bieri was deposed on December 12, 2011. Dr. Bieri rated claimant's permanent impairment of function at 5% to the whole person for the cervicothoracic spine, 10% to the left shoulder, and 10% to the left arm. He combined those rating under the AMA *Guides*<sup>3</sup> to total 15% to the whole person. Dr. Bieri opined that of the 12 work tasks identified by vocational consultant Mr. Santner, claimant cannot perform 5 tasks, for a 42% task loss.

#### **PRINCIPLES OF LAW**

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "Burden of proof means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

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<sup>3</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

The Act recognizes two different classes of permanent injuries which do not result in death or total disability. An injured employee may suffer a permanent disability to a scheduled body part or a permanent general bodily disability.<sup>4</sup> It is the situs of the disability, not the situs of the trauma, that determines which benefits are available.<sup>5</sup>

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-515(e) provides:

Any health care provider's opinion, whether the provider is a treating health care provider or is an examining health care provider, regarding a claimant's need for medical treatment, inability to work, prognosis, diagnosis and disability rating shall be considered and given appropriate weight by the trier of fact together with consideration of all other evidence.

### **ANALYSIS**

The Board finds that the Award entered by the ALJ should be affirmed.

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<sup>4</sup> K.S.A. 44-510d; K.S.A. 44-510e.

<sup>5</sup> *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

The Fund argues that the ALJ erred in discounting, or failing to consider, the impairment and task loss opinions of Dr. Fevurly. However, in the Award itself, on pages 3, 4, and 5, the ALJ specifically discusses the findings and conclusions of Dr. Fevurly. The ALJ specifically noted that he “fully considered”<sup>6</sup> Dr. Fevurly’s testimony regarding functional impairment.

The record does not support the Fund’s assertion that the ALJ inappropriately discounted or arbitrarily ignored Dr. Fevurly’s opinions regarding task loss. Although the ALJ observed that Dr. Fevurly’s “testimony regarding task loss was irrelevant to the consideration of claimant’s work disability,”<sup>7</sup> the Board construes the ALJ’s language as a finding addressing the credibility or weight to be accorded Dr. Fevurly’s opinions. Considering the Award in its entirety, the preponderance of the evidence supports the ALJ’s findings regarding Dr. Fevurly’s credibility vis-a-vis the evidence provided by Drs. Bieri and Zimmerman. Since the ALJ, and now the Board in its de novo review, have considered all of the evidence and given appropriate weight to the evidence presented, there has been no violation of K.S.A. 44-515(e).

The impairment and task loss opinions of Dr. Fevurly are, under the circumstances of this claim, entitled to less weight than those of Drs. Bieri and Zimmerman. All three doctors are qualified to provide expert testimony in the claim. However, claimant testified he continues to experience symptoms in his neck, back, left arm, and left shoulder. Claimant told Dr. Fevurly he had pain in those same areas of his body. Whereas Dr. Fevurly found permanent functional impairment only to the left shoulder, both Drs. Zimmerman and Bieri found permanent impairment in the left shoulder, left arm and cervicothoracic spine. Dr. Fevurly found that claimant requires no permanent restrictions and suffered no loss of task performing ability, however, both Drs. Bieri and Zimmerman found that restrictions were advisable and that claimant experienced a task loss. Dr. Fevurly found no impairment in claimant’s left arm even though surgical treatment was necessary to address the left elbow injury.

There is a sound basis to provide less weight to the impairment and task loss opinions of Dr. Fevurly. The ALJ did not err and the Board adopts the ALJ’s findings in that regard.

The ALJ also did not err in finding claimant sustained a 22% functional impairment to the whole body, which consists of an average of the ratings of Drs. Bieri and Zimmerman. Nor did the ALJ err in providing equal weight to the task loss opinions of Drs. Bieri and Zimmerman and in finding claimant sustained a 49.5% task loss, which is

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<sup>6</sup> ALJ Award (Feb. 19, 2012) at 5.

<sup>7</sup> *Id.* at 5.

essentially an average of the opinions of those two physicians.<sup>8</sup> The Board has considered the testimony of these two experts and agrees that their opinions should be given equal weight.

The Fund advances the position that claimant's work disability should not be based on a 100% wage loss. The basis for that argument is that claimant was in fact working as a co-driver for his wife and that the pay received by Mary Johnson from R&M Transportation also inured to claimant's benefit. Although claimant was engaging in work by sharing his wife's duties as a driver for R&M, the evidence is undisputed that claimant received no wages, benefits, or compensation of any kind from SMJ or R&M. There was no evidence that claimant received payment for his services from his wife. Economic gain is not the same as earning wages.<sup>9</sup> Post-injury wage loss must be based on a claimant's actual earnings.<sup>10</sup> Accordingly, the ALJ did not err in computing claimant's work disability based on a 100% wage loss.<sup>11</sup>

### CONCLUSION

1) The ALJ did not err in determining claimant's functional impairment and work disability.

2) In determining the extent of claimant's functional impairment and work disability, the ALJ considered the opinions of Dr. Fevurly and accorded his opinions appropriate weight.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>12</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

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<sup>8</sup> The precise average of the task loss opinions of Drs. Bieri and Zimmerman is 50% ( $42\% + 58\% = 100\% \div 2 = 50\%$ ). This slight difference would not affect the amount of the Award.

<sup>9</sup> See *Parker Rouse v. Larned Healthcare*, No. 1,045,048, 2011 WL7012242 (Kan. WCAB Dec. 2, 2011).

<sup>10</sup> *Nisler v. Footlocker Retail, Inc.*, 40 Kan App. 2d 831, 196 P.3d 395 (2008).

<sup>11</sup> The ALJ did err by not considering the weeks claimant worked and received post-injury wages from his work for respondent and G&B Express. However, those few weeks make no difference in the calculation of benefits.

<sup>12</sup> K.S.A. 2011 Supp. 44-555c(k).

**AWARD**

**WHEREFORE**, the Board finds that the February 10, 2012, Award entered by ALJ Brad E. Avery, should be, and hereby is, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September, 2012.

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BOARD MEMBER

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BOARD MEMBER

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